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*Saving a National Treasure*

December 5, 2014

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Re: Virginia Water Protection Program: Citizens Advisory Group

Dear Bill:

I submit the following comments, on behalf of Chesapeake Bay Foundation (CBF) and as a member of the Citizens Advisory Group (CAG), regarding the proposed revisions to the Virginia Water Protection Permit program. The comments focus on major concerns, not “wordsmithing” suggestions, and reflect our consideration of the entire regulation with the proposed changes.

1. Functional values assessment requirement. 9VAC25-690-60.

The proposed regulation would delete the current requirement of submitting in the permit application package a functional values assessment (FVA) for impacts greater than one acre. See 9VAC25-690-60. A FVA would be required only in cases where required compensatory mitigation would rely on permittee responsible mitigation and/or on credits at less than standard mitigation ratios. In all other circumstances, FVAs would be at DEQ’s discretion. 9VAC25-690-60 C.

We believe this change would deprive DEQ of a critical tool for evaluating project proposals to ensure no net loss of wetland functions. Indeed, even the proposed regulation recognizes at numerous junctures the importance of understanding the wetlands functions at an early stage in project evaluation. See, E.g., 9VAC25-690-70, 9VAC210-10 (definition of “ecologically preferable”). Accordingly, the current framework for FVA should be retained.

2. Compensatory mitigation framework. 9VAC25-690-70; 9VAC25-210-116.

The proposed rule would depart from the order of preference for compensatory mitigation types as established in the 2008 federal rule and as agreed by the CAG in September. The preferences as set out in the 2008 rule should be restored:

- Wetlands: Purchase or use of wetland credits from a mitigation bank, or released wetland credits from a DEQ-approved in lieu fee fund; and then purchase of advance credits from an approved in lieu fee fund.
- Streams: Purchase of stream credits from a mitigation bank or released stream credits from an approved in-lieu fee fund; and then purchase of advance stream credits from an approved in-lieu fee fund.

3. Notice of planned changes. 9VAC25-690-80.

The proposal would require DEQ approval of changes to project plans that would increase temporary impacts; but such approval would be deemed granted if DEQ does not respond within 15 days. All such requests should require an express DEQ decision.

4. Construction monitoring. 9VAC25-690-100.

The proposal would eliminate the requirement of regular submission by permittees of photos of progress (pre-construction, periodically thereafter) and any meaningful reporting to DEQ concerning the construction process. The proposal would replace these important enforcement measures with permittee self-inspections, without even any requirement of permittee certification. We fear that this proposed framework would undercut the agency's oversight and enforcement ability, and so we recommend retaining the existing scheme.

5. Minor modifications. 9VAC25-210-175.

The proposal would amend the minor modification provision by allowing, inter alia, the permittee to make larger impacts—up to an additional acre (rather than a quarter acre) of additional wetlands impacts and up to an additional 1,500 feet (rather than 100 feet) of additional stream impacts—without board review or public participation. The reasoning behind such proposal is not clear. The existing limits should be retained to ensure appropriate public and regulatory scrutiny.

6. Administrative Continuances. 9VAC25-210- 65.

The proposal would create a new administrative continuance option for permittees seeking permit renewal where DEQ has not timely responded. The option would be available so long as the permittee is in compliance or where the permittee is “coordinating with DEQ to resolve noncompliance.” 9VAC25-690-25 B, C 3. We think this proposal is unwise for several reasons.

First, discussions in the CAG did not reflect any demand or pressure from stakeholders for this continuance option.

Second, robust agency review is essential to making this program work, yet administrative continuances will surely allow for reduced agency review. Indeed, recent MS4

William Norris  
Virginia Department of Environmental Quality  
December 5, 2014  
Page Three

permitting history (before a different agency) provides a cautionary tale about delays in permit updates and renewals made possible by the availability of administrative permit continuances.

Third, the current proposal would allow administrative continuances even in cases where the permittee is not in compliance—so long as something undefined and open-ended (labeled here as “coordinating”) is occurring. Such language would deprive DEQ of the ability to refuse an administrative continuance and threaten to allow free passes to noncompliant permittees.

These proposals, individually and collectively, weaken the agency’s ability to oversee and enforce the implementation of Virginia’s Water Protection program. While we are optimistic that further consideration and discussion can bring about improvements, CBF would be unable to support the regulations in the form currently proposed.

Please let me know of any questions. I look forward to discussing these concerns at the December 8, 2014 CAG meeting.

Sincerely,

A handwritten signature in dark ink, appearing to read "Margaret Sanner", with a long horizontal flourish extending to the right.

Margaret L. (Peggy) Sanner  
Virginia Assistant Director and Senior Attorney

cc: Ann F. Jennings, Virginia Executive Director, CBF